bottom dollar that I will be on that witness stand staring you in the eye and telling you I didn't do it.

And there he sits. For just one reason, because he can't look you in the eye. *He can't tell you that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed.* (Tr. 65-66; see also Tr. 51) (Emphasis added).

On this record the Ohio Court of Appeals and the Ohio Supreme Court sustained Respondent's conviction without opinion. 173 Ohio St. 542, 184 NE 2d 213. Respondent filed a notice of appeal and in the alternative petitioned for certiorari before this Court on December 29, 1962. No. 877, October Term, 1962. In his Jurisdictional Statement, *inter alia,* Respondent argued that the prosecutor's repeated attacks on Respondent for not taking the stand, where the State had proved nothing but innocent conduct, deprived Respondent of a fair trial. Jurisdictional Statement, p. 27, No. 877. October Term, 1962. In other words, when the prosecution had established only an innocent and commonplace transaction—*i.e.,* borrowing money on a single promissory note—due process was not complied with where the sole evidence of guilt was the prosecutor's statement that Respondent must be guilty because he did not take the stand.

On May 13, 1963, in a *per curiam* opinion, Respondent's appeal was dismissed and writ of certiorari was denied, with a dissent by Mr. Justice Black who thought probable jurisdiction had been shown. 373 U.S. 240 (1963).

On June 24, 1963, relying on the opinion of Mr. Justice Brennan in *Fay* v. *Noia,* 372 U.S. 391 (1963),

indicating that a habeas corpus proceeding was an appropriate collateral remedy to raise constitutional issues, even where appeal and petition for certiorari have been denied, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. (Tr. 3-14). The writ raised the following constitutional questions: (i) whether the Ohio Securities Act, as interpreted, was void for vagueness in the circumstances of this case where the evidence established only that Respondent had, in a single private transaction, given a promissory note to a friend in exchange for a personal loan; (ii) whether the transfer of the burden of proof to the Respondent to prove his innocence and the use of a statutory presumption as evidence that there was an unlawful public offering of securities denied Respondent due process of law; and (iii) whether the prosecutor's closing argument, in which he stated that Respondent's failure to take the stand was evidence that there was a public offering, denied Respondent due process of law.

On July 9, 1963, the District Judge dismissed the writ (Tr. 83); and on July 10, 1963, notice of appeal to the Court of Appeals for the Sixth Circuit was filed. (Tr. 86). The appeal raised all three constitutional arguments noted above. While this appeal from dismissal of the writ of habeas corpus was pending in the Sixth Circuit, a petition for certiorari was filed in the case of *Griffin* v. *California* on October 16, 1963.

Respondent's appeal from the denial of habeas corpus by the District Court was argued before the Court of Appeals on June 16, 1964. The day before, on June 15, the decision of this Court in *Malloy* v. *Hogan,* 378 U.S. 1 (1964), came down. On November

10, 1964, the Court of Appeals for the Sixth Circuit held that, on the comment issue, the *Malloy* decision was controlling and that the prosecutor's comment denied Respondent due process of law. *Shott* v. *Tehan*, 337 F. 2d 990 (6th Cir. 1964) (Tr. 87). The Court of Appeals did not pass on the remaining issues Respondent had raised. On the comment question, it set aside the final order of the District Court and remanded for further proceedings consistent with its opinion, stating:

> On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan*, 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states.
>
> Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any questions. We find no merit in this factual distinction. As pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.
>
> The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.
>
> The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein. (337 F. 2d at 992; Tr. 90-91).

This case is now pending in the state court awaiting the decision here under the following order sent to the Court of Common Pleas of Hamilton County, Ohio, by the United States District Court on January 5, 1965, after remand:

> IT IS ORDERED that this cause should be and it is hereby remanded to the Court of Common Pleas of Hamilton County, Ohio, for further proceedings consistent with *United States, ex rel. Edgar I. Shott, Jr.* v. *Dan Tehan,* 337 F. 2d 990, within 90 days hereof; otherwise, relator's release shall be final and unconditional.
>
> IT IS FURTHER ORDERED that relator recover from the respondent the costs on appeal, and that the clerk of this court issue execution therefor.
>
> IT IS FURTHER ORDERED that relator shall remain subject to further order of this court.

No steps were taken by the Petitioner to stay the effectiveness of this order. It therefore constituted a final and unconditional release of Respondent before *Griffin* was decided.

On February 10, 1965, after the remand of this case to the Ohio court, the petition upon which certiorari has been granted in this case was filed in this Court by Petitioner. The principal ground of that petition was that Respondent had impliedly waived his constitutional rights. In its Order granting certiorari, the Court noted that Mr. Justice Douglas has suggested that this case be sent back to the District Court for a determination of whether there was such a waiver. Unfortunately, in our opposition we did not quote from the Record to show that Petitioner's waiver claim was frivolous. We now refer to p. 49 of the Record which shows that Respondent's counsel did object to the prose-

cution's comment on his failure to take the stand. (Tr. 49). Petitioner's claim of waiver, which he did not make in the District Court or Court of Appeals, is based on the following excerpt from Respondent's counsel in his address to the jury:

> Now, I would like to meet head-on his allegation that the Defendant did not take the stand in this case and that he is indicating his guilt because he is not taking the stand. I will tell you why the Defendant did not take the stand in this case. Because I refused to let him take the stand, because, in a criminal case, and this is something that I have known long before I went to law school, members of the jury, in the United States of America no man is under an obligation to prove he is not guilty of a crime. In a criminal case in Cincinnati, Hamilton County, United States of America, the state has the burden of proving the Defendant guilty beyond a reasonable doubt, and neither Edgar I. Shott, nor any other man charged with a crime in the Anglo-American system of justice, has any obligation to take the stand, and I can't think of a better time or place to put that principle of law into operation than right here and now. (Tr. 52).

It is impossible to argue that this could constitute a waiver of Respondent's constitutional rights.

On April 28, 1965, the opinion in *Griffin* v. *California* was handed down. 380 U.S. 609 (1965). On May 24, 1965, certiorari was granted in this case. The Court specifically requested argument on the question of the retroactivity of the doctrine announced in *Griffin* v. *California*.

ARGUMENT

A. Assuming That This Court Decides That the Reversal of the Adamson Case By Griffin Should Not Be Retroactively Applied, That Determination in No Way Justifies the Reversal of the Court of Appeals' Decision on Habeas Corpus in This Case.

We point out that the record in this case does not raise the question whether or not *Griffin* should be applied only prospectively following the opinion in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), for two reasons. First, the Court of Appeals decision granting habeas corpus was handed down prior to the *Griffin* case. Certainly the *Linkletter* rule should not be used to reverse previously decided cases which are in accord with the *Griffin* case. An opinion of this Court reversing the decision of the Court of Appeals would take on the flavor of Alice in Wonderland. The reasoning would have to be something like this: "The court below correctly interpreted *Malloy* v. *Hogan.* Its *opinion* granting habeas corpus to the Respondent is approved. Nevertheless, the *decision* must be reversed because, though right in principle, it was handed down at the wrong time. The Court of Appeals should not have anticipated what the decision in *Griffin* was going to be." Thus the Respondent would have to go to jail—after he had won his case in the Court of Appeals and after a mandate had gone down to the Court of Common Pleas in Ohio, directing that Court either to retry Respondent or to release him unconditionally.

Second, even if the Court of Appeals had not granted habeas corpus, the opinion in *Linkletter* would require the rule in *Griffin* to be applied here. In de-

ciding that the *Mapp* doctrine[1] should not be applied retroactively, *Linkletter* made it clear that this did not include convictions in cases which were not *finally* decided before the rendition of the *Mapp* opinion. In all cases pending at the time of the *Mapp* opinion, the decision was to be governed by *Mapp*.

Petitioner's brief attempts to construe the word "final" to mean finality in the state courts. But the *Linkletter* opinion makes it clear that this is not the test. In a footnote in *Linkletter* the Court defined the meaning of the word "final" as follows:

> 5. By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*. (381 U.S. at 622).

It is true that this footnote does not explicitly mention a pending habeas corpus proceeding as one which precluded finality. But it is inconceivable that the Court intended to make a distinction between a pending habeas corpus proceeding and a pending petition for a writ of certiorari.[2] Suppose at the time of the *Griffin* decision there had been three cases pending involving the same constitutional issue, i.e., the right of the prosecutor to comment on the failure of the defendant to take the stand. Suppose that one of these

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[1] *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[2] The Court's opinions in *Fay* v. *Noia*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963) indicate that as a matter of proper judicial administration, certiorari may be denied in a particular case because the Court prefers to review the matters on a writ of habeas corpus where it has the advantage of the District Court's examination of the facts. Thus, denial of a writ of certiorari may in a proper case be an invitation to the Respondent to bring it up again to the Court on habeas corpus.

cases was pending on a writ of habeas corpus. Suppose the second was pending on a writ of certiorari. Suppose that in the third the time for bringing the writ of certiorari had not expired. It would be fantastic to assume that *Griffin* would not apply to the pending habeas corpus for overruling as well as to the pending certiorari petitions.

Thus, the issue in this particular case does not involve the application of the *Griffin* doctrine to cases which were in repose prior to April 28, 1965, the date of the *Griffin* decision. In no sense can the *Shott* case be said to be final when Respondent was asserting the same point, and had won on that point, prior to the *Griffin* decision.

We therefore respectfully suggest that if the purpose of certiorari here was to use this case as a vehicle for determining the retroactivity of *Griffin* in the light of *Linkletter,* certiorari has been improvidently granted. Any opinion which the Court could render on the issue of whether the *Griffin* rule was more like the *Mapp* case than the *Gideon* case[3] would, on the facts before the Court, be mere dicta.

If, however, the opinion of counsel for Respondent on the general issue of retroactivity of *Griffin* in cases where proceedings were not pending at the time of the decision is relevant, we would suggest that *Griffin* should be applied retroactively.

The majority in *Linkletter* pointed out that to make the rule of *Mapp* retrospective would tax the administration of justice because hearings would have to be held on evidence long since destroyed, misplaced or deteriorated. In contrast, to make the *Griffin* rule

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[3] *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

retrospective would simply require the examination of a record to find out whether the prosecution had commented on a defendant's refusal to testify. Only in those cases where no written transcripts of the proceedings existed (and these must be very few since written transcripts have been the rule throughout the country for many years) would the issue be one that could neither be proven nor disproved. And in such cases the burden of proof should be on the convicted defendant.

Moreover, *Linkletter* noted that the Court has uniformly applied due process decisions retroactively where "the principle that we applied went to the fairness of the trial—the very integrity of the fact finding process." 381 U.S. at 639. *See, Eskridge* v. *Washington Prison Bd.,* 357 U.S. 214 (1958); *Doughty* v. *Maxwell,* 376 U.S. 202 (1964); *Jackson* v. *Denno,* 378 U.S. 368 (1964). In contrast, in *Linkletter,* the rule was not applied retroactively in circumstances where "the fairness of the trial [was] not under attack." 381 U.S. at 639. As the *Linkletter* opinion stated, the basic purpose of the *Mapp* rule was to deter unlawful conduct by those sworn to uphold the law and thus prevent future unlawful searches and seizures. The quality of the evidence in the *Mapp* trial was not in issue. Indeed, the quality of the evidence obtained in the *Mapp* case, as in most unlawful search and seizure cases, was superb. It was also squarely revelant and, under the provisions of the Ohio law, impelled the conviction of Mrs. Mapp. In *Linkletter,* the majority felt that the real purpose of *Mapp* was its prospective deterrence to unlawful police conduct and that past convictions, obtained by the use of relevant damning evidence, albeit illegally obtained, need not be disturbed.

But the evidence condemned in *Griffin* v. *California,* as in the instant case, is in practical effect evidence manufactured by the prosecutor in his comment to the jury. As this Court pointed out in *Griffin,* a rule permitting comment by the prosecutor is "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." 380 U.S. at 613. Such comment on the refusal to testify is,

> a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. (380 U.S. at 614).

What is involved here is not merely disciplining a local county prosecuting attorney. The principle of the *Malloy* and *Griffin* case is that a defendant cannot be forced to convict himself. The standards of a fair trial require that:

> Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. (*Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964)).

Comment on refusal to testify, as the record in this case demonstrates, is an effective and offensive technique to attempt to force a defendant to convict himself. The prosecutor can blur the evidence actually before the jury by his suggestions what the defendant's refusal to take the stand implies. This has been demonstrated here where the prosecutor used Respond-

ent's refusal to testify itself as evidence that there must have been a public offering of securities—a multiplicity of transactions—which is the *sine qua non* of a Blue Sky conviction.

Thus, both the ease of retroactive administration of the *Griffin* rule and the purpose of its promulgation to insure a fair trial require the retroactive application of its standards of due process.

B. If the Court Is Not Persuaded That in No Event Can the Application of the Rule in Linkletter Justify the Reversal of the Court of Appeals in the Case at Bar, in All Fairness It Should Give Consideration to Respondent's Argument Made on Appeal or Petition for Certiorari Which Was Denied in May, 1963, Mr. Justice Black Dissenting.

In our argument on the original appeal in this case, we assumed that the rule in the case of *Adamson* v. *California,* 332 U.S. 46 (1947), was still the law. We argued that even under the doctrine of *Adamson,* the use of the right to comment on Respondent's failure to take the stand in the case at bar violated Respondent's constitutional rights. See, Jurisdictional Statement, No. 877, October Term, 1962, p. 26. Our reasoning was as follows:

The Ohio Securities Act had been interpreted by the trial court to place the burden of proof on any person who engaged in the usual and innocent business transaction of borrowing money on a promissory note to go on the stand and prove that the note was not part of a public offering. On cross-examination of the State's witness, counsel for Respondent thought that the burden had been met. It was clear from the evidence that the note on which indictment was based was a personal loan to a friend. It was for that reason

that counsel for Respondent did not put him on the stand.

Had the State had any evidence that the note on which the prosecution was based was part of a public offering, it should have produced it. Indeed, there is a strong inference from the prosecutor's failure to produce such evidence that it did not exist.

The evidence in this case shows only a single transaction between two friends. The prosecutor therefore obtained a conviction by combining the provisions in the Ohio statute shifting the burden of proof to Respondent to show that a single promissory note was not part of a public offering with his own testimony before the jury that Respondent's failure to take the stand was proof that there were multiple transactions. Hindsight being better than foresight, it may well have been a mistake not to put Respondent on the stand, but, as we show in our Petition for Rehearing of the appeal or writ of certiorari, which was denied in 1963, the case was a cause celebre for days and weeks. See Petition for Rehearing, No. 877, October Term, 1962. Denied, 374 U.S. 858. Respondent had loaned money to a man named Stickler who had extracted millions from the citizens of Cincinnati through the operation of a Ponzi scheme by offering them 25 per cent on their investment in 60 days. Respondent had been a victim of that scheme. There was no claim at his trial that he had been a participant or that his transactions had been tainted with fraud. If Respondent had taken the stand, he would have subjected himself to great publicity and embarrassment. Therefore his counsel, thinking that no case had been established against him, advised him not to testify. (Tr. 52-53).

A fair comment on the failure of Respondent to take the stand as permitted by *Adamson* would have been

to point out to the jury matters in the evidence which required explanation and to tell the jury that under those circumstances Respondent's refusal to explain was significant. But here there was nothing in the record which required any explanation. The prosecutor's comments were in effect affirmative statements that there must have been a multiplicity of transactions similar to the one on which the indictment was based, because if this were not true, the Respondent would have taken the stand. Under these circumstances, the Respondent did not have a fair trial, even under the doctrine of the *Adamson* case.

In our briefs filed in connection with the appeal and alternative writ of certiorari, denied in 1963, we argued, and we think correctly that a presumption of guilt cannot be based on a commonplace and innocent act of signing a single promissory note. We further argued that the prosecutor's use of comment, which relied upon the unconstitutional presumption of guilt, deprived Respondent of a fair trial. Only if this Court believes that the doctrine in the *Linkletter* case compels the reversal of the Court of Appeals' decision on habeas corpus will these issues, and the other issues raised in our original appeal, be before it. To avoid the expense of reprinting our arguments on these issues in this brief, we ask leave of this Court to distribute copies of our original briefs filed in connection with Respondent's appeal. In these papers the justification and the authorities supporting our position that habeas corpus should be granted even under the rule in the *Adamson* case are set forth in detail.

CONCLUSION

The decision of the Court of Appeals in *Shott* v. *Tehan* should be affirmed.

THURMAN ARNOLD
JAMES F. FITZPATRICK
Counsel for Appellant
1229 19th Street, N. W.
Washington, D. C.

Of Counsel:

JAMES G. ANDREWS, JR.
205 Atlas Bank Building
Cincinnati 2, Ohio

JOHN A. LLOYD, JR.
1409 Union Central Building
Cincinnati 2, Ohio